A

AZIZAN OSMAN & ORS

v.

KERAJAAN NEGERI KEDAH & ORS

B

COURT OF APPEAL, PUTRAJAYA
RAUS SHARIF JCA
HASSAN LAH JCA
SULONG MATJERAIE JCA
[CIVIL APPEAL NO: K-01-147-2006]

C

28 JANUARY 2009

CIVIL PROCEDURE: *Striking out - Action - Appeal against - Judicial review - Quarry project - Development of area within vicinity of forest reserve - Planning permission - Initiation of action in a case*

D *involving public and private rights - Whether plain and obvious case for striking out - Triable issues - Rules of the High Court 1980, O. 15 r. 16, O. 18 r. 19, O. 53 r. 3(6)*

This was an appeal by the appellants against the decision of the

E judicial commissioner allowing the respondents' applications under O. 18 r. 19 of the Rules of the High Court 1980 ('RHC') to strike out the appellants' originating summons on account of the appellants' failure to comply with the strict provisions of O. 53 of the RHC. The present case pertained to the appellants' opposition

F against a granite quarry project in the Gunung Jerai Forest Reserve, and their efforts in seeking the court's assistance for judicial review under O. 53 r. 3(6) of the RHC and/or the inherent powers of the court. It must be noted that any development to be carried out within the vicinity of the said Reserve must be in

G compliance with the gazetted Structure Plan for the district of Yan. The main issue was whether it was fatal for the appellants to proceed under O. 15 r. 16 of the RHC for the declarations and consequential orders sought.

Held (allowing the appeal)

H **Per Sulong Matjeraie JCA delivering the judgment of the court:**

(1) The appellants had contended that there were at least two illegal acts done. Firstly, it was alleged that the approval of the

I quarry project was in contravention of the Structure Plan for the district of Yan. It was their contention that a local planning authority shall not grant planning permission if the

development in respect of which the permission is applied would contravene any of the provisions of the development plan. This was the stipulation under s. 22(4)(a) of the Town and Country Planning Act 1976. Secondly, the appellants also alleged that the 5th and 6th respondents had no planning permission from the 2nd respondent, Majlis Daerah Yan. It was further submitted that the appellants were the beneficial owners of the land adjoining the site of the granite quarry, and that they were staying within the vicinity of the site. The respondent, however, averred that the appellants were not the owners of the land. It could thus be observed that there were some disputed facts. That was not all. In a case involving public and private rights even the choice on how to initiate an action could be at variance. From the nature of the claim, there was still doubt as to whether this instant application should be by way of O. 53 or O. 15 of the RHC. Therefore, this was not a plain and obvious case that could be disposed of by way of O. 18 r. 19 of the RHC. The appellants had raised important issues which may only be resolved through a full hearing. (paras 27, 28, 29, 30, 31 & 35)

[Order accordingly.]

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan oleh perayu-perayu terhadap keputusan pesuruhjaya kehakiman membenarkan permohon-permohonan responden-responden di bawah A. 18 k. 19 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') untuk membatalkan saman permulaan perayu-perayu disebabkan kegagalan perayu-perayu untuk mematuhi peruntukan-peruntukan ketat A. 53 KMT. Kes semasa berkaitan dengan penentangan perayu-perayu terhadap sesuatu projek kuari granit dalam Hutan Simpanan Gunung Jerai, dan usaha-usaha mereka dalam menuntut pertolongan mahkamah bagi kajian semula kehakiman di bawah A. 53 k. 3(6) KMT dan/atau kuasa-kuasa sedia ada mahkamah. Ia mesti diperhatikan bahawa apa-apa pembangunan yang dijalankan di kawasan sekitar Simpanan itu mesti mematuhi Pelan Struktur untuk daerah Yan yang diwartakan. Isu utama merupakan sama ada ia adalah fatal bagi perayu-perayu untuk meneruskan di bawah A. 15 k. 16 KMT untuk mendapat deklarasi dan perintah-perintah berbangkit yang dituntut.

Diputuskan (membenarkan rayuan)
Oleh Sulong Matjeraie HMR menyampaikan penghakiman mahkamah:

(1) Perayu-perayu telah menghujahkan bahawa terdapat sekurang-kurangnya dua perbuatan melanggar undang-undang yang telah dilakukan. Pertamanya, ia telah dikatakan bahawa kelulusan projek kuari itu ialah melanggari Pelan Struktur untuk daerah Yan. Ia merupakan hujahan mereka bahawa satu pihak berkuasa perancangan tempatan tidak seharusnya memberi kebenaran perancangan jika pembangunan yang merupakan sebab kebenaran itu dimohon akan melanggar mana-mana peruntukan-peruntukan pelan pembangunan itu. Ini adalah stipulasi di bawah s. 22(4)(a) Akta Perancangan Bandar dan Negara 1976. Keduanya, perayu-perayu juga mengatakan bahawa responden kelima dan keenam tidak ada kebenaran perancangan daripada responden kedua, Majlis Daerah Yan. Ia lagi dihujahkan bahawa perayu-perayu adalah tuan punya benefisial tanah bersempadanan dengan tempat di mana kuari granit itu terletak, dan bahawa mereka tinggal di kawasan sekitar tempat itu. Responden, walau bagaimanapun, berkata bahawa perayu-perayu bukan tuan punya tanah itu. Ia, oleh itu, boleh diperhatikan bahawa terdapat fakta-fakta yang dipertikaikan. Ia bukan itu sahaja. Dalam suatu kes yang melibatkan hak-hak awam dan persendirian pilihan mengenai bagaimana memulakan satu tindakan pun boleh bertentangan. Dari sifat tuntutan itu, masih terdapat keraguan sama ada permohonan semasa sepatutnya dibuat melalui A. 53 ataupun A. 15 KMT. Oleh yang demikian, ini bukan merupakan suatu kes yang jelas dan ketara yang boleh diselesaikan melalui A. 18 k. 19 KMT. Perayu-perayu telah membangkit isu-isu penting yang hanya boleh diselesaikan melalui satu pembicaraan penuh.

[Diperintah sedemikian.]

Case(s) referred to:

AG of Duchy of Lancaster v. L & NW Rly Co [1892] 3 Ch 274 ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd [1899] 1 QB 86 ***(refd)***

Trustees of the Dennis Rye Pension Fund and Another v. Sheffield City Council [1977] 4 All ER 747 ***(refd)***

Wenlock v. Moloney & Ors [1965] 1 WLR 1238 ***(refd)***

Legislation referred to:
National Forestry Act 1984, s. 10
National Forestry (Adoption) Enactment 1985, s. 13(1)(b)
Rules of the High Court 1980, O. 3 r. 5, O. 15 r. 16, O. 18 r. 19, O. 53 r. 3(6)
Town and Country Planning Act 1976, s. 22(4)(a)

For the appellants - Meenakshi Raman (Karina Yong, Theivanai Armathalingam & Jessica Binwani with her)
For the 1st respondent - YB Dato' Zakiah Kassim (Puan Rafiah Yusoff with her)
For the 2nd respondent - Jegadeeson Thavasu
For the 3rd & 4th respondents - Suzana Atan (Azizah Nawawi with her)
For the 5th respondent - Tan Beng Hope
For the 6th respondent - Ahmad Moosdeen (R Raja Seelaan & S Kanaga Sundran with him)

[Appeal from High Court, Alor Setar; Originating Summons No: 24-709-2006]

[Editor's note: For the High Court judgment, please see Azizan Osman & 4 Ors v. Kerajaan Negeri Kedah & 5 Ors [2007] 1 LNS 520.]

Reported by Suresh Nathan

JUDGMENT

Sulong Matjeraie JCA:

[1] This is an appeal brought by the appellants (plaintiffs at the court below) against the decision of the learned Judicial Commissioner who allowed the respondents' applications made under O. 18 r. 19 of the Rules of High Court 1980 to strike out the appellants' originating summons.

Brief Facts

[2] On or about 16 December 1997, the 1st respondent, the State Government of Kedah assented to the Structure Plan for the district of Yan from 1995-2020 and the same was Gazetted on 1 January 1998.

[3] According to the Structure Plan, the Gunung Jerai Forest Reserve is to be preserved as a Water Catchment Forest. Any activity that can destroy the natural environment and that may affect the supply of clean water shall not be allowed. Should there

A be any development to be carried out within the vicinity of the said area, it must be in compliance with the Structure Plan. This is the requirement of the Town & Country Planning Act 1976.

[4] On or about 12 September 2001, the 1st respondent
B granted the 5th respondent, Kemelong & Sankojaya Sdn Bhd an approval for a granite quarry on a 100 acres site in the Gunung Jerai Forest Reserve (hereinafter referred to as "the site"). The 6th respondent, K.S. Chin Minerals Sdn Bhd is the Operator of the Quarry. Consequently the quarry site was declared as ceasing to
C be a Forest Reserve by the 1st respondent from 10 October 2001.

[5] The appellants (collectively called the 'appellant') are residents of Kampong Singkir, Genting and Kampong Bidong and these villages are located within the vicinity of the site; approximately within 1 to 3km range.
D

[6] The 2nd respondent, Majlis Daerah Yan, is the Local Authority responsible under the Town and Country Planning Act ('TCPA') for the enforcement of the Yan Structure Plan.

E **[7]** The 3rd respondent, the Director General of the Department of Environment, is responsible for the enforcement of the provisions of the Environmental Quality Act particularly the Environmental Impact Assessment ('EIA') relating to the 5th respondent's quarry project.

F **[8]** The 4th respondent, the State Director of Lands and Mines, Kedah, is answerable to the 1st respondent for the administration/ implementation of the provisions of the National Land Code in the State of Kedah and shall act in accordance with any instructions
G given by the 1st respondent.

[9] On or about 15 April 2002, the 5th respondent was given a 30 year lease of the quarry site by the 4th respondent.

[10] It is common ground that the site in question is recognised
H as environmentally sensitive in that the area must be maintained as a Water Catchment Area. This is to ensure a clean supply of water to the surrounding communities, for flood prevention and for the protection of the area as a whole where a large farming community which forms part of the "Jelapang Padi Negara" –
I (Rice bowl of the Nation) can be found.

[11] The quarry project requires a detailed EIA report. It is now known that 3rd respondent approved the EIA report sometime in 2005. The villagers on the ground were not directly notified, consulted or informed by any of the respondents of the various approvals or actions relating to the site.

[12] In early 2004, the appellant observed some operations at the site and sought assistance of various organisations such as Sahabat Alam Malaysia (SAM) and Angkatan Sahabat Alam Sekitar (ASAS) to investigate the matter. On 11 February 2004 the Legal and Enforcement Division of the Department of Land and Mines, Kedah, confirmed the approval of the quarry project by the State Executive Committee.

[13] In May and June 2004 mud floods occurred in the areas surrounding the site and fiur villages namely Kampong Singkir Genting, Singkir Darat, Singkir Bedong and Singkir Laut were affected.

[14] A committee chaired by the 5th appellant opposed the quarry project and handed over a memorandum opposing the project to the Office of the Menteri Besar, Kedah on 30 August 2004. SAM also made representation to the 3rd respondent opposing the project.

[15] From late 2004 to early 2006, the appellant waited for the decision of the 3rd respondent on the 2nd EIA report submitted on behalf of the 5th respondent. No quarry work could proceed without the EIA report being approved by the 3rd respondent.

[16] The appellant was never informed directly or otherwise if the EIA report had been approved but only realised that it may have been approved when blasting works began in earnest in mid February 2006. The appellant wrote to the 1st and 2nd respondents. This led to a "stop work order" being issued by the 2nd respondent against the 5th respondent on 8 March 2006. However, the stop-work order has not been enforced resulting in the continuation of the blasting operations.

[17] Despite their appeal, the authorities are alleged to have allowed the quarry to continue with their operation. Hence the appellant sought the assistance of the Court for leave for judicial

review under O. 53 r. 3(6) of the Rules of High Court 1980 and or the inherent powers of the court and for the following reliefs and remedies:

(1) For leave to extend time to file this application under O. 53 r. 3(6) and O. 3 r. 5 of the Rules of High Court 1980;

(2) For leave to apply for judicial review for the following reliefs:

(i) A declaration that the approval of the 5th respondent's quarry project by the Majlis Mesyuarat Kerajaan Kedah Darul Aman (Kedah Executive Committee) dated 12 September 2001 was null and void;

(ii) A declaration that the 1st respondent's purported declaration under s. 13(1)(b) of the National Forestry (Adoption) Enactment 1985, pertaining to the cessation of PT 36, Daerah Yan, Mukim Singkir as part of the Gunong Jerai Forest Reserve was null and void;

(iii) A declaration that the site is a Water Catchment Forest under s. 10 of the National Forestry Act 1984;

(iv) A declaration that the approval of the Environment Impact Assessment report submitted on behalf of the 5th respondent in relation to the Quarry project by the 3rd respondent was null and void;

(v) Other several consequential orders.

[18] At the hearing on 11 July 2006 it was notified that the State Executive Committee had decided to close the quarry. No subsequent action was taken and the matter in court continued.

Respondents' Application

[19] The respondents filed separate applications to the High Court at Alor Setar, Kedah under O. 18 r. 19 Rules of High Court 1980 to strike out the appellant's originating summons.

Main Issues

[20] The respondents contended as follows:

(1) The appellant prayed for reliefs *inter alia* against decisions of public authorities without leave from court pursuant to O. 53 of the Rules of High Court 1980;

(2) There was inordinate delay in filing this application contrary to O. 53 r. 3(6) Rules of High Court 1980 which requires that such application be made within 40 days. The application was filed almost two years after having full knowledge of the Quarry Project in early 2004;

(3) This action is an abuse of process of court as there are two appeals namely this instant Appeal No. K-01-147-2006 which is against the interlocutory dismissal of the Originating Summons No. 24-709-2006 and Appeal No. K-01-7-2008 which is against the dismissal of judicial review of the originating motion filed on the same set of facts. The appellant having admitted that they ought to have proceeded by way of an application for judicial review in the first instance and having made that election by representation, cannot approbate and reprobate and must be deemed to have abandoned this appeal against the dismissal of the Originating Summons No. 24-709-2006.

(4) The appellant has no *locus standi* as none of the appellant is the registered or beneficial owner of the land adjoining to the site and none have shown any special injury. Clearly therefore there is no *locus standi* to institute these proceedings;

Ruling Of The Learned Judicial Commissioner

[21] The learned Judicial Commissioner allowed the respondents' application under O. 18 r. 19 of the Rules of High Court 1980 resulting in the striking out of the originating summons of the appellant.

Grounds Of Appeal

[22] This appeal is against the decision of the learned Judicial Commissioner who had allowed the applications of the 1st to 6th respondents under O. 18 r. 19 of the Rules of High Court 1980 on account of the failure by the appellant to comply with the strict provisions of O. 53 of the Rules of High Court 1980.

[23] The issue before us is:

> Was it fatal for the Appellant to proceed under Order 15 r.16 Rules of High Court, 1980 for the declarations and consequential orders sought?

[24] The sub-issues are:

(i) Are O. 53 and O. 15 r. 16 Rules of High Court 1980 mutually exclusive?

(ii) If not, what would be the most suitable procedure in the present case?

(iii) Even if there was an irregularity, was there an abuse of process in the present case?

Arguments Of The Respondents

[25] Learned counsel for the 6th respondent submitted to this court that the appeal should be struck out with costs and his arguments can be summarised in the following manner for it was alleged that:

(i) The appellant had abused the process of the court and have by conduct abandoned this action;

(ii) The appellant had prayed for reliefs against the decision of public authorities without leave from the court;

(iii) There was inordinate delay in filing their application as it was alleged that the appellant were fully aware of the Quarry Project in early 2004;

(iv) The appellant had no *locus standi* as none of the appellant were registered or beneficial owners of the land adjoining the site;

(v) The appellant appealed to the Court of Appeal and then filed for Judicial Review *vide* an Originating Motion No. 25-01-2007 which was struck out on 9 December 2007. There is also an appeal against the dismissal of the Judicial Review to the Court of Appeal and registered under Civil Appeal No. K-01-7-2008.

[26] The other learned counsel representing the other five respondents in this proceeding have adopted the submission of the learned counsel for the 6th respondent and therefore it is not necessary to repeat their submissions here.

[27] It is interesting to note that in the submission made by learned counsel Ms. Meenakshi Raman for the appellant, it was their contention that there were at least two illegal acts made. Firstly, it was alleged that the approval of the quarry project was in contravention of the Structure Plan for the District of Yan. It is their contention that a local planning authority shall not grant planning permission if the development in respect of which the permission is applied would contravene any of the provisions of the development plan. This is the stipulation under s. 22(4)(a) of the Town and Country Planning Act 1976.

[28] Secondly, it is also the allegation of the appellant that the 5th and 6th respondents have no planning permission from the 2nd respondent, Majlis Daerah Yan.

[29] Further Ms Meenakshi Raman submitted that the appellant are beneficial owners of the land and that they are staying within the vicinity of 1 to 3km of the site. Learned counsel for the 1st respondent however said that the appellant are not the land owners.

[30] It could therefore be observed that there are some facts which are in dispute. That is not all. In a case involving public and private rights even the choice on how to initiate action can be at variance. Should an application for judicial review be adopted or should it be by way of originating motion? That was one of the issues involved in *Trustees of the Dennis Rye Pension Fund and Another v. Sheffield City Council* [1977] 4 All ER 747. From the nature of the claim, there is still a lingering doubt on this lamentable position if this instant application should be by way of O. 53 or by way of O. 15 of the Rules of High Court 1980.

[31] It is therefore the unanimous view of this court that this is not a plain and obvious case that can be disposed off by way of O. 18 r. 19 of the Rules of High Court 1980.

[32] Even before examining the above issues, we feel compelled to consider if O. 18 r. 19 Rules of High Court 1980 is an appropriate rule to apply in this instant case. There is a long line of authorities which suggests that only in plain and obvious case should recourse be had to the process under this rule, per Linley MR in *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86.

[33] In the case of *AG of Duchy of Lancaster v. L & NW Rly Co* [1892] 3 Ch 274 it was held that this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable'. It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v. Moloney & Ors* [1965] 1 WLR 1238, [1965] 2 All ER 871.

[34] With respect, all the above cases have been accepted by the highest court in the land in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 SC.

[35] After considering the pleadings and after hearing the submission of learned counsel for both sides, we are satisfied that the appellant have raised some important issues which may only be resolved through a full hearing. This is simply not a plain and obvious case envisaged by O. 18 r. 19 of the Rules of High Court 1980.

[36] We therefore unanimously allowed the appeal by the appellant, set aside the order of the learned Judicial Commissioner, and remitted back the case to High Court at Alor Setar, Kedah. By agreement of the parties, there shall be no order as to costs. The deposit paid is to be refunded to the appellant.